

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

RANDBURG

CASE NUMBER: LCC66R/99

In chambers: **GILDENHUYS J**

MAGISTRATE'S COURT CASENUMBER:205/98

In the review proceedings in the case between:

BERNARDUS HENRY ALBERTS

Plaintiff

and

MZUKAYIFANE AMON SIBIYA

Defendant

JUDGMENT

GILDENHUYS J:

The facts

[1] This matter comes before me on automatic review in terms of section 19(3) of the Extension of Security of Tenure Act ¹ (hereinafter “the Tenure Act”). The plaintiff in the matter is the owner of the farm Dorstfontein 526, district Melmoth, KwaZulu-Natal (hereinafter “the farm”). Defendant is an occupier of the farm, within the meaning given to that term under the Tenure Act. Defendant was previously employed on the farm.

[2] Plaintiff caused a summons to be served on the defendant wherein an order of eviction and ancillary relief was claimed. Although the summons was served on defendant personally, he did not enter an appearance to defend. Plaintiff applied for default judgment, and filed affidavits in support of the application. The magistrate was not satisfied with the affidavits, and called upon the plaintiff to submit evidence that defendant’s right of residence was terminated in terms of section 8, and that the provisions of section 10 or 11 were complied with. The plaintiff’s attorney then filed a certificate in support of the application for default judgment, and annexed thereto further supporting affidavits and documents. Thereupon the magistrate gave judgment against the defendant “as claimed in the summons”.

1 Act 62 of 1997, as amended.

Requirements for an eviction order [sections 12(1)(a) and (b) and 13(1)(a) and (b)]

[3] An eviction order must comply with certain compulsory requirements imposed by the Tenure Act. The most important of these are the determination of a date upon which the occupier must vacate the land [section 12(1)(a)], the date upon which the eviction order may be carried out if the occupier has not vacated the land [section 12(1)(b)], the determination of compensation for any improvements made by the occupier or for standing crops planted by the occupier [section 13(1)(a)] and the payment of any outstanding wages or related amounts due to the occupier [section 13(1)(b)].

[4] When granting default judgment, the questions of compensation for improvements and for standing crops and the payment of outstanding wages were not addressed at all. There is a duty on the magistrate to make the requisite enquiries.² Where (as in this case) the plaintiff applies for judgment by default, he must make the necessary information available to the Court. This was not done.

Prerequisites for an eviction order

[5] The prerequisites for an eviction order are contained in section 9(2), which reads as follows:

“9(2) A court may make an order for the eviction of an occupier if -

- (a) the occupier’s right of residence has been terminated in terms of section 8;
- (b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;
- (c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and
- (d) the owner or person in charge has, after the termination of the right of residence, given-
 - (i) the occupier;

2 *Ferguson v Buthelezi and Another*, LCC41R/99, unreported, 23 September 1999 website address <http://www.law.wits.ac.za/lcc/1999/fergusonsum.html> par [19] - [22]; *Nel v Calitz and Another*, LCC63R/99, unreported, 1 November 1999, par [19]-[21].

- (ii) the municipality in whose area of jurisdiction the land in question is situated; and
- (iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes,

not less than two calendar months' written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with."

The plaintiff did not comply with all of these requirements, as I will indicate hereunder.

Right of residence must have been terminated [section 9(2)(a)]

[6] It is stated in the particulars of claim (which was later confirmed by the plaintiff under oath) that -

"The Defendant's occupation of the farm was directly linked and dependant upon the existence of an employment relationship between the parties."

The following statement is contained in a letter by plaintiff's attorney to defendant dated 6 May 1998, in which letter he was informed of plaintiff's intention to apply for an eviction order:

"It is our instructions that you were previously employed on the farm but that you committed serious breaches of the employment agreement by inter alia:

- 1 Unlawfully cutting timber on the farm;
- 2 Unlawfully hunting and poaching on the farm;
- 3 "Sub-leasing" grazing on the farm to outsiders;
- 4 Keeping excessive numbers of livestock on the farm without the farm owner's permission.

It speaks for itself that the employment agreement has terminated. Your right to occupy the property therefor also ceased to exist and in this regard we refer to correspondence between ourselves and your previously attorney of record, Fiona Viviers of Melmoth dating back as far as May 1996 when you were informed that our client insist that you vacate the land and remove yourself, your livestock and all your belongings voluntarily. You have thus far failed to do so."

From the evidence submitted to the magistrate, the termination of the employment agreement to which defendant's occupation of the farm was linked, certainly does not "speak for itself", as the letter of 6 May 1998 seems to suggest. Compelling grounds on which the defendant could have been dismissed are set out, but there is no evidence of his actual dismissal.

[7] In response to the magistrate's request for evidence that the defendant's right of residence to occupy the farm has been terminated, the plaintiff's attorney filed a certificate which contains the following submission:

“Dit word met eerbied aangevoer dat in sover as wat daar gesê kan word dat daar tevore ‘toestemming’ bestaan het ingevolge waarvan die verweerder op die plaas kon woon, sodanige toestemming wel regmatig ingetrek was voor 4 Februarie 1997. Die bepalings van artikel 3 van die Verblyfregwet vind gevolglik toepassing.”

I must point out that if the defendant did not at some stage have permission to live on the farm, he would not be an “occupier” in terms of the Tenure Act and the Tenure Act would not apply. Judging from the particulars of claim annexed to plaintiff's summons, the plaintiff accepted that the Tenure Act applies. No particulars were given by the plaintiff of when and how the employment agreement and the concomitant right of residence was terminated. Under section 3(2),³ on which the plaintiff relies, the withdrawal of the permission to reside must be “lawful” and must also be “just and equitable”. The actual withdrawal of the permission was not established, let alone that such withdrawal was “lawful” and “just and equitable”.

Failure to vacate the land within the period of notice given [section 9(2)(b)]

[8] It is a prerequisite for an eviction order under the Tenure Act that the occupier has not vacated the land within the period of notice given by the owner or the person in charge. This requirement is imposed under section 9(2)(b). The notice referred to therein is not the same notice as the notice required under section 9(2)(d)(i). The letter of plaintiff's attorney to the defendant dated 6 May 1998, which is evidently intended to be a notice under section 9(2)(d)(i), refers to correspondence with defendant's previous attorney of record.

3 Section 3(2) reads as follows:

- “(2) If a person who resided on or used land on 4 February 1997 previously did so with consent, and such consent was lawfully withdrawn prior to that date-
 - (a) that person shall be deemed to be an occupier, provided that he or she has resided continuously on that land since consent was withdrawn; and
 - (b) the withdrawal of consent shall be deemed to be a valid termination of the right of residence in terms of section 8, provided that it was just and equitable, having regard to the provisions of section 8.

Copies of some correspondence between plaintiff's attorney and defendant's previous attorney were lodged with the Magistrate, but none in which the defendant was called upon to vacate the land within a given period, as required under section 9(2)(b). The plaintiff must establish that before service of the notice under section 9(2)(d)(i), the defendant was called upon, but failed to vacate the farm. The plaintiff did not establish this.

Compliance with section 10 or 11 [section 9(2)(c)]

[9] Because the defendant was already in occupation of the farm on 4 February 1997, the plaintiff's attorney submitted that section 10 (and not section 11) is applicable, and that its requirements were met. He referred to paragraph 5 of the particulars of claim, the veracity of which the plaintiff confirmed under oath, in support of his submission. Paragraph 5 reads as follows:

“The Defendant's employment relationship with the Plaintiff was lawfully terminated on the following grounds:

- 5.1 The Defendant is unlawfully cutting timber on the farm;
- 5.2 The Defendant is unlawfully hunting and poaching on the farm;
- 5.3 The Defendant is 'sub-leasing' grazing on the farm to outsiders;
- 5.4 The Defendant is keeping excessive numbers of livestock on the farm without the Plaintiff's permission.”

Section 10(1), on which the plaintiff relies, reads as follows:

“10(1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if -

- (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
- (b) the owner of person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
- (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
- (d) the occupier -

- (i) is or was an employee whose right of residence arises solely from that employment; and
- (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.”

Plaintiff’s attorney, in his certificate, did not indicate on which subsection of section 10(1) the plaintiff relies, nor why that particular subsection is applicable, nor how the requirements of that particular subsection were met.

Prescribed notices must have been given [section 9(1)(d)]

[10] Section 9(2)(d) requires that notices (in the prescribed form) of the plaintiff’s intention to obtain an order for eviction must be given to the defendant, to the municipality in whose area of jurisdiction the farm is situated and to the head of the relevant provincial office of the Department of Land Affairs. At the time when the notices were given, the regulations contained in Government Notice R1632 of 18 December 1998 were not yet made, and there was no prescribed form in which the notices had to be cast.

[11] A notice given by plaintiff to defendant, evidently under section 9(2)(d)(i), is dated 6 May 1998. The last paragraph reads as follows:

“You are hereby given notice of our client’s intention to proceed to apply for an eviction order against you after expiry of two calendar months from this notice.”

A copy of the notice was furnished to the Pietermaritzburg office of the Department of Land Affairs. There is no indication of whether the farm falls within the area of jurisdiction of any municipality, and whether any notice was given to such a municipality. Subject to the possible requirement of notice to a municipality, and considered in isolation, the requirements of section 9(2)(d) seem to have been met.

Order

[12] From what is set out above, it follows that the judgment of the magistrate must be set aside. Should the plaintiff decide to re-apply for judgment, the magistrate is requested to consider the various matters raised in this judgment.

[13] The judgment of the magistrate, Melmoth, given on 2 September 1999 in case 205/98 is hereby set aside in whole and substituted by the following:

- a the application for default judgment is dismissed;
- b the plaintiff is given leave to re-apply on the same papers, supplemented as he may be advised, for default judgment; and
- c no order is made as to costs.

JUDGE A GILDENHUYS

4 November 1999

For plaintiff:
Mr A B T van der Merwe of Cox and Partners, Vryheid.